STATE OF MICHIGAN

COURT OF APPEALS

BETTY K. NEFF,

Plaintiff-Appellant,

v

PETOSKEY PUBLIC SCHOOLS,

Defendant-Appellee.

UNPUBLISHED
March 27, 2003

No. 236287
Emmet Circuit Court
LC No. 00-006115-NZ

Before: Schuette, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition under MCR 2.116(C)(10). This case arose from plaintiff's claim of age discrimination in defendant's hiring process under the Civil Rights Act (CRA), MCL 37.2202(1)(a). We affirm.

Plaintiff argues that the trial court erred in granting summary disposition because she presented both direct and circumstantial evidence of age discrimination. We review the trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) de novo, considering the evidence submitted by the parties in a light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 118, 120; 597 NW2d 817 (1999).

The direct evidence on which plaintiff relies was the disputed fact that defendant's superintendent asked her age and retirement plans during her job interview. Even assuming this fact is true, however, it does not constitute direct evidence of age discrimination. Direct evidence is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). Merely asking a candidate's age or retirement plans, without more, does not compel the conclusion that age discrimination occurred. See, e.g., *Shorette v Rite Aid of Maine, Inc*, 155 F3d 8, 13 (CA 1, 1998) (rejecting age discrimination claim where district manager had asked plaintiff his age and when he planned to retire); *Colosi v Electri-Flex Co*, 965 F2d 500, 502 (CA 7, 1992) (two inquiries regarding an employee's retirement plans did not constitute direct evidence of age discrimination). Furthermore, it is undisputed that plaintiff herself, not defendant, first raised the issue of retirement with John Jeffrey, who conducted plaintiff's job interview. Particularly given this context, the alleged question by itself is insufficient direct evidence that discrimination was a motivating factor in the decision.

Plaintiff next argues that summary disposition was improperly granted because she presented circumstantial evidence of age discrimination under the burden-shifting framework set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), and adopted for age discrimination cases under the CRA in *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-178; 579 NW2d 906 (1998). To establish discrimination by this method, a plaintiff must first prove a prima facie case. The burden then shifts to the defendant to provide non-discriminatory reasons for its actions. If the defendant is successful in doing so, the plaintiff must show that the proffered reasons are merely pretextual. *Id*.

Plaintiff argues that the trial court erred in finding that, although she had proved a prima facie case, she failed to show that defendant's proffered reasons were pretextual. We disagree. To establish that defendant's stated legitimate, nondiscriminatory reasons were pretextual, plaintiff may (1) show the reasons had no basis in fact, (2) if they have a basis in fact, show that they were not the actual factors motivating the decision, or (3) if they were factors, show that they were jointly insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990). Plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but must also show that it was a pretext for age discrimination. *Lytle (On Rehearing)*, *supra* at 175-176.

In the case at bar, defendant offered two reasons for its hiring decision: first, it considered the chosen candidate more qualified; second, the decision-makers believed plaintiff would have more difficulty qualifying for the annual vocational authorization (AVA) required for non-certified teachers. Soundness of an employer's business judgment may not be questioned as a means of showing pretext. *Dubey*, *supra* at 566, citing *Chappell v GTE Products Corp*, 803 F2d 261, 266 (CA 6, 1986).

We reject plaintiff's argument that defendant's claimed misunderstanding of the AVA requirements is evidence of pretext. Even if defendant was incorrect in its understanding of the AVA requirements, defendant might nonetheless have been correct in determining that its chosen candidate would qualify for an AVA more readily than plaintiff. Because defendant's assessment does not imply that this reason was a pretext for age discrimination, plaintiff's argument fails. *Lytle (On Rehearing)*, *supra* at 175-176.

Because plaintiff failed to produce either direct evidence of age discrimination or evidence that would lead a reasonable trier of fact to conclude that the reasons proffered by defendant for not hiring plaintiff were a pretext for age discrimination, summary disposition was properly granted.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Kurtis T. Wilder